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TEXTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1043

UNION TRUST COMPANY,
a Corporation, as Trustee under Paragraph Nineteenth of the Will of Ann Porter, Deceased,
PETITIONER,
vs.
BERTHA PAULINE GENAU, et al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

BRIEF OF COUNSEL FOR RESPONDENTS

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ISSUED

1. The Union Trust Company, *the sole petitioner,* cannot raise the questions attempted by it to be raised on behalf of the Theosophical Society.

2. There is no Federal question involved, hence this Court does not have jurisdiction to review the decision of the Supreme Court of Florida invalidating a will upon the ground that it violates the public policy of Florida against perpetuities.

3. This case does not warrant certiorari by any reasonable test.

We discuss these contentions briefly in the order named.

There is but one specification of error. It raises the question that the Theosophical Society has

> "been deprived of its liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

If so, the Theosophical Society (or at most the executor under the will, administration not having been completed or the estate turned over to the trustee, R. 43, 47), must raise the question. The so-called trustee cannot. It was not trustee when the will was filed and is not now trustee because it did not have or hold the property.

Section 733.01 Florida Statutes (1941) provides that

> "The personal representative shall take possession of the estate of a decedent, real and personal (except homestead) and the rents, income, issues and profits therefrom whether accruing before or after the death of the decedent, and of the proceeds arising from the sale, lease, or mortgage of the same or any part thereof. All such property and the rents, income, issues and profits therefrom shall be assets in the hands of the personal representative for the payment of legacies, debts, family allowance, estate and inheritance taxes, claims, charges and expenses of administration, and to enforce contribution and to equalize advancements and for distribution."

Peradventure the property might be consumed in due course of administration and never reach the potential trustee.

Actions can only be maintained by a party in interest — a present vested interest. A probable or prospective interest is not enough.

Jones v. Eastham, et al.
36 SW 2d 538.

In fact, the Union Trust Company had no right to file its bill in the State Court to have the will construed (R. 43) because the estate was still in process of administration (R. 43) and the bill specifically avers that

> "No distribution has yet been made to the Union Trust Company of any property devised or bequeathed to it as trustee of the foregoing Paragraph of the will of Ann Porter, deceased" (R. 47)

referring to said Paragraph Nineteenth of the will. It follows that the bill of the Union Trust Company to construe the will had no standing in Court, but since the executor had just filed a similar bill, there was no point in the trial court in moving to dismiss the bill of the so-called trustee. Counsels' brief, page 17, says:

> "Authority to represent trust beneficiaries in such actions is conferred upon trustees by Florida Statutes, 1941, Sections 63.08, 63.12 and 87.04, as amended."

We join issue upon this statement for several reasons:

(1) The Union Trust Company was not a trustee, at most it was only a prospective or potential trustee when the bill was filed, and so far as we, or the Court knows that condition still obtains. Said Section 63.08 provides that

> "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought."

Manifestly, the Union Trust Company was not "trustee of an express trust," or at all. Said Section 63.12 provides that

"In all suits concerning property which is vested in trustees where such trustees are competent to sell and give discharges for the proceeds of the sale, or the rents, income or profits of the estate, all or any such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents, income or profits, and in such cases it shall not be necessary to make the persons beneficially interested in such property, or rents, income or profits, parties to the suit;" etc.

The Bill of Complaint expressly shows that the suit was not

"concerning property which is vested in trustee"

because it says no distribution had been made to the trustee. (R.47)

Said Section 87.04 provides that

"Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or equitable or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or other; or

(2) To direct the executor, administrator, or trustee to abstain from doing any particular act in his fiduciary capacity; or

(3) To determine any question arising, in the administration of the estate or trust, including questions of construction of wills and other writings."

This Section does not authorize suit by a *potential trustee.*

"Before a party may secure a declaration of rights under declaratory judgment statute, it must appear that question raised is real and not theoretical and that party raising it has a bona fide and direct interest in the result."

Miami Water Works Local No. 654 v. *City of Miami (Fla.)*
26 So. (2d) 194

(2) The alleged Federal question presented by petitioner is outside of the limitations of this Section expressed in sub-sections "(1), (2), and (3)."

(3) Furthermore, none of the statutes cited by counsel contemplate that such grave and *purely personal* questions as the status of the Theosophical Society under the Fourteenth Amendment, or under the Federal Constitution's guarantee of religious liberty, should be decided in an action wherein the said Society is not a party, and particularly where such questions arise (if they have arisen) *only incidentally* in a suit to construe a will.

> "The general rule is, that in suits respecting trust property brought either by or against the trustees, the cestui que trust as well as the trustees are necessary parties."
>
> *John Carey, et al.*, vs. *Henry T. Brown*
> 92 U.S. 171, 23 L.Ed. 469
>
> *Griley* vs. *Marion Mortgage Co., et al.*,
> 132 Fla. 299, 182 So. 297

(4) Constitutional guarantees such as the right of liberty and to possess property are purely and distinctly personal. They are not assignable and cannot be vicariously enforced.

> 16 C. J. S., 157 et seq.
>
> "The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust."
>
> Section 280, Restatement of the Law of Trusts.

Under this test the Union Trust Company cannot invoke for the benefit of the Theosophical Society constitutional

guarantees personal to such Society because such question would not arise if the Trust Company held the property free of trust. When such constitutional questions were injected into the action to construe the will (if they were injected) it became the duty of the Theosophical Society if it desired such questions litigated or its rights protected thereunder to intervene, and to have personally applied for this writ of certiorari.

> "A party appealing in order to have right of appeal must have some pecuniary interest or some personal right which is immediately or remotely affected and concluded by the decree appealed from."
>
> *Ballard, et al., vs. McGuire, et al. (Mass.)*
> 56 NE (2d) 891

SECOND: There is no Federal question involved, hence this Court does not have jurisdiction to review the decision of the Supreme Court of the State of Florida.

Opposing counsel admit that no Federal question was decided by the Supreme Court of Florida, but make the strange contention, wholly unsupported by the record, that the Florida Court could not have construed Ann Porter's will without deciding whether the Theosophical Society is a religious organization, and having failed to do so the decision was essentially arbitrary or a mere device to prevent its review by this Court within the rule of

McCoy vs. Shaw
277 U.S. 302, 72 L.Ed. 891

This contention is inconsistent with the alleged uncertainties of the will and the reasons for its construction as set forth in Petitioner's Bill of Complaint (see Paragraph 5 of the bill, R. 47-48, and the prayer of the Bill, R. 52-54). The prayer "(b)" is that the Court

> "Determine and decree whether Paragraph Nineteenth of said Will directs the accumulation of one-half of the net income from the trust thereby created for a period longer than is permitted by law."

The Court held that it does and is, therefore, void under the law against perpetuities. (R. 418-421) The Court then said:

> "The conclusion having been reached that the creation of the Porter-Genau memorial fund in perpetuity violates the common law rule against perpetuities and our former adjudications, then a pertinent question arising on the record is, namely: what is the legal effect of the invalid provision of paragraph 19 on the charitable provision of the same paragraph, *and arguendo, conceding that the charity provision is public in character.*" (R. 421)

After quoting from several authorities, the Court states its conclusion as follows:

> "Thus it is to be observed that the financial provisions of the Porter-Genau Memorial Fund and the several charitable bequests become dependent on each other; the source of financial existence and income for the two funds are inextricably interwoven; there is such a co-mingling of the two funds as to render them inseparable; if the cy pres doctrine is applied the two funds remain indivisible. *The illegality of the Porter-Genau Memorial Fund takes with it and renders void the several bequests in paragraph 19 for charity.*" (R. 423)

So it is that for the purpose of deciding the case, the Florida Court assumed that the Theosophical Society is a charity, also the other eight so-called charitable objects, but the Court said that the provisions for charity being inseparable from the invalid provision for a perpetual memorial, the whole must fall. Similarly prayer "(c)" of the Bill (R. 52) asks the Court to specify what the consequence would be

> "if this Court should determine that Paragraph Nineteenth of the will of Ann Porter, deceased, directs the accumulation of one-half of the income from the trust thereby created for a longer period than is permitted by law"

and the Court did just that. Likewise, prayer "(d)" asks the Court to say whether in such an event Paragraph Nineteenth is invalid. Prayers "(e)" and "(f)" are to the same general effect; also prayers "(g)" and "(h)" ask the Court to define the plaintiff's duties as trustee under certain circumstances. All of which involve the validity of Paragraph Nineteenth of the will. If it was invalid the potential trustee had no duties with reference to it.

Counsel overlook the important fact that the determination of the status of the Theosophical Society as a charity (religious organization) never became necessary because the Court disposed of the case on another point, which had to be determined before the question of the status of the Theosophical Society would become pertinent. If the will had been sustained against the objection that it sets up the corpus of the entire estate as a private memorial and provides that 50% of all income shall be used in perpetuity for the preservation of that memorial, the next step would have involved the competency of the nine specified objects to participate in the other one-half of the income, which the trustee out of the memorial fund was directed to distribute annually. At that point the question might have become pertinent whether the Theosophical Society is a public charity, but the will was found to be invalid before reaching that point.

Notwithstanding, the Florida Court says:

> "We have reached the conclusion in the case at bar that paragraph 19 offends the rule against perpetuities and our previous adjudications," (R. 425)

and, notwithstanding, the Court assumed for the purpose of its decision that the nine objects named in Paragraph Nineteenth are charitable, opposing counsel charge in effect that the Court was so prejudiced against the Theosophical Society that it based its decision on an unfederal ground in order that it might deprive the Theosophical Society of rights under the will and prevent a review by this Court. This charge is fantastic and reckless. It is manifestly unjustified by the record, which on the contrary shows that the Court truly stated the ground of its decision.

> "When the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it."
>
> *Williams v. Kaiser*
> 323 U.S. 471, 89 L.Ed. 397

Of course, there was no Federal ground upon which the Florida Court might have planted its decision, but be that as it may the rule above quoted requires the dismissal of the petition for certiorari.

THIRD: Certiorari not warranted.

Incidentally, if we were wrong in everything we have heretofore said in this brief, it is true nevertheless that this case does not fall within the class of cases which this Court will review upon certiorari.

Our failure to reply to other contentions of opposing counsel must not be construed as admission thereof or concurrence therein, but we deem them too far at variance with the facts and law to justify further extension of this brief. Obviously, it would be out of place here to argue the character of the Theosophical Society

which, however, has been the subject of judicial consideration.

In re Carpenter's Estate
297 N.Y.S. 649

Korstroms vs. Barnes
167 Fed. 216

New England Theosophical Corp. vs. City of Boston
51 N.E. 456

Respectfully submitted,

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